(2)

Supreme Court, U.S.
FILED
MAR 16 2005
OFFICE OF THE CLERK

No. 04 - 826

In The
Supreme Court of the United States

LLOYD U. NSEK, Sr., - *Petitioner*

v.

CIRCLE K STORES et al. - *Respondents*

On Petition For Writ Of Certiorari
To The Court of Appeal for the
State of California Fourth Appellate District
Division Two

PETITION FOR REHEARING

LLOYD U. NSEK, Sr.
IN PROPRIA PERSONA
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QUESTION PRESENTED

On May 4, 2004 by invitation of the Court of Appeal, Fourth Appellate District, Division Two, the herein petitioner in pro per, Lloyd Nsek, invoked the legal authorities of Statute §74 and Statute §128 in his oral amended pleadings with regards to his discrimination case before the Court. In response, the Appellate Court has remained invariably silent on the amended pleadings leaving petitioner in absolute darkness. In California, informed citizens are aware that these Statutes are within the jurisdictional power of the legislature; they are vital to the welfare of society and are favored by law; they provide all citizens the much needed repose, and as such constitute meritorious defenses. Hence, the petitioner presents the United States Supreme Court with the following question below:

- Is there a separate set of procedural and appellate jurisdictional rules that govern amended pleadings and appeals on demurrers based on statute of limitations, or is society in California to continue to repose its hopes in the efficacy of California rules of Court, rule §74 and rule §128 in the court of law: i.e. (1) an amended complaint supersedes all prior complaints; and (2) a Court of Appeal is not to supplant an amended complaint using silence.

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TABLE OF AUTHORITIES CITED

CASES CITED

Armentrout v. Aaron Rents, Inc., No. 7:01cv757 (W. D. Va. Feb. 27, 2003).

Ebbert v. DaimlerChrysler, PICS NO. 03-0I44

Marston v. AT&T Corp., 210 FRAUD 1679 (E. D. Va. 2002)

STATUTES AND RULES

California Rules of Court, rule §74

California Rules of Court, rule §128

Government Code §12960

Government Code §12965 (b)

OTHER

The United States Constitution: The Fourteenth Amendment.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

Petitioner respectfully prays that a rehearing on the Petition for a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of The Supreme Court of The United States appears at Appendix A to the petition.

GROUNDS FOR REHEARING

The Petitioner prays the Court to rehear this case on the merits of an intervening circumstance of a substantial effect not previously presented. The circumstance in question involves postal mail delivery in the United States as a very critical factor in the legal arguments in Nsek v. Circle K Stores, et al.

Attached as appendix B to this petition for rehearing, Petitioner herein presents the Court with the evidence of the registered mail envelop that was undeliverable to Respondent for no apparent or justifiable reason. The United States Postal Service records show that Respondent received (1) first delivery notice on 12/17/04, (2) second delivery notice on 12/22/04, and (3) the package was returned on 1/1/05 to Petitioner. Upon receipt, Petitioner mailed the package again the third time to Respondent in order to comply with Rule 29.3 of this Court.

On analysis, it becomes crystal clear that had the package

not been registered, it would have been very difficult to ascertain Petitioner's compliance with Rule 29.3 of this Court. Furthermore, it would have left Petitioner with a burden much too heavy to bear pertaining to either clearing up any doubt or answering any question of whether or not Petitioner did in fact mail the package containing 3 booklets of the petition for a writ of certiorari to Respondent.

As it now stands, this current circumstance places Respondent in the same corner with the Department of Fair Employment and Housing [DFEH] in relation to the Petitioner's contention that he filed by mail the original DFEH complaint, signed and dated March 9, 2000. In light of the present intervening circumstance, the difference between these two situations is that the mail to DFEH was sent uncertified at the time. As a result, the reasonable inference to be drawn from its unaccountability is apt to be that it was either misplaced or lost by DFEH. Given the ensuing problems associated with sending and receiving mail in this case, Petitioner prays the Court not to let Respondent off the hook by affirming the demurrer. It was raised as a technicality to elude justice in the face of circumstance truly beyond Petitioner's control.

Since its inception, the four causes of legal action against Respondent being protected areas of the law have never been contested. Respondent has not contested (1) violation of Government Code Section 12940 (a) - Race & Color Discrimination and Harassment; (2) violation of Government Code Section 12940 (h) and 12926 (m) - National Origin or Ancestry Discrimination & Harassment; (3) Retaliation and violation of Government Code 12940 (h), and (4) violation of Government Code 12940 (k) - Failure to provide or cure Harassment and Discrimination. Therefore, given the foregoing, Petitioner prays the Court to rehear this case on the merits of the following reasons:

1. THE COURT SHOULD NOT PUNISH PETITIONER FOR THE PITFALLS ASSOCIATED WITH MAIL DELIVERY IN THE UNITED STATES.

With Respondent unable to receive a certified mail from Petitioner on two failed attempts, it lends much credence to Petitioner's contention with regards to the DFEH complaint filed by mail, signed and dated March 9, 2000. Taken as a recurring problem, it serves to show that mail delivery is not entirely fool proof (See Ebbert v. DaimlerChrysler, PICS NO. 03-0I44).

As a result, the Court need not punish Petitioner on this instance case of the demurrer at issue by affirming it. The demurrer should be reversed because Petitioner had no control over the mechanics of the delivery of the DFEH complaint filed by mail. Like Respondent's package that was undeliverable on two failed attempts even though it was certified, so was Petitioner's original DFEH compliant which was either misplaced or lost. By all accounts, no one would have known the status of the Respondent's package save for it being certified with return signature requested.

Therefore, as it was held in Armentrout v. Aaron Rents, Inc., No.7: 01 CV 757 (W. D. Va. Feb. 27, 2003), Equal Employment Opportunity Commission's (EEOC) failure to send right-to-sue notice to Armentrout's Counsel excused late lawsuit. On analysis of the case, it was clear to that court that had either Armentrout or her Counsel received the right-to-sue notice by mail the first time from EEOC, Aaron Rents, Inc., would have no issue to argue in court. Nonetheless, when it finally came, Counsel for Armentrout filed lawsuit regardless of the lapse in time, which was of no consequence.

In retrospect, if the DFEH had received as well as acted at first instance of the Petitioner's original complaint filed by mail, signed and dated March 9, 2000, Respondent would have no cause to raise a demurrer. However, when Petitioner finally resolved his case on May 9, 2001 by a walk-in visit to DFEH

with the copy to his original complaint, he was then mailed his right-to-sue notice on May 10, 2001. Upon receipt, Petitioner filed his lawsuit. In doing so, Petitioner was in compliance with Statutes §12960 and §12965 (b) requirements.

2. THE COURT SHOULD AFFIRM THE ACTION OR CONDUCT OF DFEH WHO ACTED IN GOOD FAITH.

When the Department of Fair Employment and Housing [DFEH] accepted Petitioner's copy to the original complaint on May 9, 2001, it acted all in good faith. There was adequacy of documentation at DFEH showing that Petitioner had already opened a case file well within the stipulation of Government Code §12960. All that was pending was the complaint that was sent by mail, which never arrived or was misplaced or lost. Barring all the pitfalls of mail delivery, an appropriate official at DFEH made the determination to accept copy to the original complaint from Petitioner (See Marston v. AT&T Corp., 210 FRAUD 1679 (E. D. Va. 2002).

Unlike Respondent's mail that was returned as undeliverable by virtue of its certified status, the mail to DFEH has suffered an inexplicable fate since it was not certified. However fortunate or unfortunate the present situation is, the only DFEH complaint before the Court is the photocopy of the original, which contains on the same face, clear and affirmative facts to support arguments from both Petitioner and Respondent alike. But in light of the intervening circumstance being Respondent's undelivered registered mail from Petitioner, it is clear that Petitioner did in fact comply with Government Code §12960 as of March 9, 2000 when he filed by mail his DFEH complaint. As a result, it is not enough that the complaint of the demurrer at issue should show that the action may be barred, in the spirit of California Rules of Court, rule §74. The complaint is just a copy of an original. There was adequate proof at DFEH to show intent for strict compliance by

Petitioner. Given the foregoing, to accept the DFEH document of the demurrer at issue, the Court should accept it in total, and not in selective parts, in accordance with the spirit of California Rules of Court, rule §128.

CONCLUSION

The Court should grant this petition being an amended complaint which supersedes all prior complaints in this civil action.

Respectfully submitted,

LLOYD U. NSEK, Sr.
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CERTIFICATION OF COUNSEL

I, Lloyd U. Nsek, Sr., herein known as the Petitioner, hereby declare that this petition for rehearing before The Supreme Court of The United States is presented in good faith and not for delay.

SIGNED L. Nsek

DATE: MARCH 15, 2005

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 22, 2005

Mr. Lloyd U. Nsek, Sr.
13225 Lambrusco Court
Rancho Cucamonga, CA 91739

Re: Lloyd U. Nsek, Sr.
v. Circle K Stores, et al.
No. 04-826

Dear Mr. Nsek:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

January 10, 2005

Lloyd Nsek, Sr.
13225 Lambrusco Ct.
Rancho Cucamonga, CA. 91739

Ronald C. Specter, Esq.
Michael H. Artinian, Esq.
SPECTER & WILLOUGHBY LLP
4625 MacArthur Court,
Suite 1150
Newport Beach, CA. 92660

Re: Nsek v. Circle K Stores, et al.

Dear Counsel:

Enclosed are three booklets of the above case made available to you in compliance with the SUPREME COURT OF THE UNITED STATES, Rule 29.3. For your information, this is the third attempt to deliver these booklets to you. Post office records show that you received first notice on 12/17/04, second delivery notice on 12/22/04, and the package was finally returned on 1/1/05. Thanks.

Sincerely,

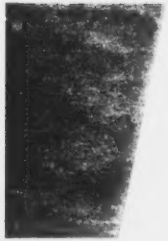
Lloyd Nsek, Sr.
(Petitioner)

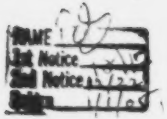
From: LLOYD U. NSEKSR
13225 LAMBERSON CT
RANCHO CUCAMONGA
CA 91739

7004 2510 0004 6241 2091

U.S. POSTAGE
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91739
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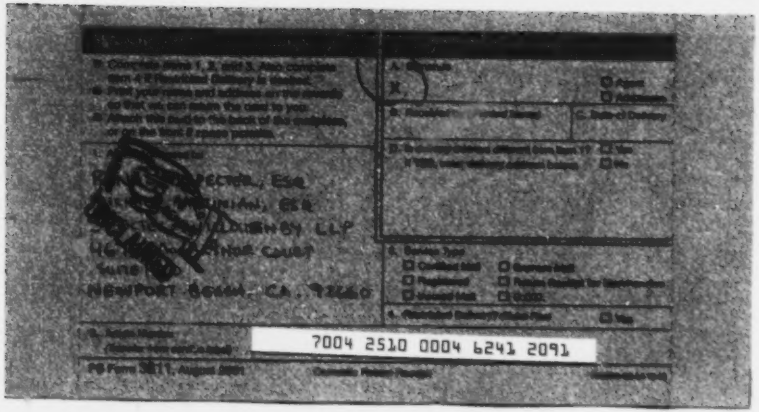
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APPENDIX B

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